No. 20151

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES, to the Use of AIR HANDLER, INC., a Corporation,

Plaintiff, Cross-Defendant and Respondent,

vs.

LEW F. STILWELL, INC., a Corporation, and UNITED PACIFIC INSURANCE CO., a Corporation,

Defendants, Cross-Complainant and Appellants.

APPELLEE'S REPLY BRIEF

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APPELLEE'S REPLY BRIEF

I.
STATEMENT OF THE CASE

As set forth in appellant's opening brief, this is an action under the Miller Act (U. S. Code, Title 40, Sections 270, 270(a), 270(b), 270(c) and 270(d)). Use plaintiff is a subcontractor and the defendant, Lew F. Stilwell, Inc., a corporation, the prime contractor. Defendant, United Pacific Insurance Company, is the bonding company for the prime contractor.

The prime contract (Plaintiff's Exhibit 1) was executed on or about May 18, 1962. The subcontract

upon which this suit is based was executed on or about May 31, 1962 (Plaintiff's Exhibit 8). The prime contract called for performance of the entire job within 90 days, but no penalty attached for failure to complete within this time (Reporter's Transcript, page 16, lines 7-17). The work to be done by the use plaintiff comprised three fields: sheet metal, plumbing, and air conditioning (Plaintiff's Exhibit 8, the subcontract, and plaintiff's Exhibit 9, the specifications).

The total amount of the sub-contract was $102,-007.44; that thereafter due to certain changes required by the prime contractor there were two additional charges of $491.35 and $109.49 (Reporter's Transcript, page 76, line 21 to page 77, line 8).

August 5, 1962, defendant paid plaintiff $5,296,-.35 and on August 24, 1962, a further payment was made by defendant to use plaintiff of $7,803.51, and subsequent thereto certain payments were made by the defendant to the use plaintiff's suppliers in the aggregate of $56,098.92, leaving a total paid by defendant to use plaintiff and for his benefit of $96,-198.78 (Reporter's Transcript, page 75, line 7, page 76, line 1). This left a balance of $34,146.06.

Use plaintiff continued to perform under the terms of the subcontract until on or about October 30, 1962 (Reporter's Transcript, page 80, lines 20-22). On that date, the defendant ordered plaintiff off the job (Reporter's Transcript, page 70, line 9 to page 72, line 14). The job was accepted by the government on November 7, 1962 (Reporter's Transcript, page 243, line 18 to page 244, line 2). The prime contractor received the whole amount due under the prime contract with the government

December 3, 1962 (Reporter's Transcript, page 17, line 22 to page 18, line 7). Defendant, Lew F. Stilwell, testified that on or about December 3, 1962, he received the entire amount of the contract with the exception of $1.00 and another item that was in dispute and not involved with the subcontractor (Reporter's Transcript, page 242, line 22 to page 243, line 8). No complaint was made by the defendant, Stilwell, as to the quality of any work done by the use plaintiff as testified to by the foreman of the defendant, Mr. White, (Reporter's Transcript, page 230, line 5 to line 18). The action was filed on May 6, 1963, (Clerk's Transcript, page 2). Subsequent to the departure of use plaintiff from the job, Utility Heating completed the work of the use plaintiff. Arnold Miller, doing business as Utility Heating and Cooling, testified on behalf of the defendant. He indicated that the work which his organization did was very minor work (Reporter's Transcript, page 221, line 1 to line 6). The amount of the charge by Utility Heating to the prime contractor was in the neighborhood of $1,500.00 (Reporter's Transcript, page 221, line 17 through line 25). At the time of trial, defendant presented a "back charge" for earth work and cement work (Defendant's Exhibit S). This back charge was for $18,000.00 and was disallowed by the court. In addition to the back charge for the earth and cement work and the back charge for Utility Heating and Air Conditioning, the latter being stipulated to by use plaintiff, a third back charge appeared at the time of trial in Exhibit P. The back charge represented by Exhibit P and the Exhibit S aforesaid were never presented to the use plaintiff prior to the trial of the action (Reporter's Transcript, page 285, line 16 to page 286, line 4).

II.
ARGUMENT OF THE CASE

As was most aptly stated by Mr. Youngblood at the trial of the action, this matter and the action itself is a question of fact.

"THE COURT: This is a question of fact. I don't believe very much law is involved. It is a question of fact.

MR. YOUNGBLOOD: I think it is primarily a question of fact."

(Reporter's transcript, page 258, lines 12 to 15).

Certain issues of fact are set forth on page 4 of appellant's opening brief. We do not think the majority of them are pertinent. Point one is whether or not proper notice was given by use plaintiff as provided in Title 40, U. S. C., Section 270(b). In the case at bar there was a direct contractual relationship between the subcontractor use plaintiff and the defendant prime contractor. No notice is required under the Miller Act under such circumstances. See *U. S.* -vs- *U. S. Fidelity*, 113 Fed. 2d 888, *U. S. ex rel Hargis* -vs- *Maryland*, 64 Fed. Supp. 522, at page 527, *Continental Casualty* -vs- *U. S.*, 305 Fed. 2d 794, *U. S. for the Use of Strona* -vs- *Bussey*, 51 Fed. Supp. 996.

The second question of fact raised by appellant was whether or not use plaintiff was a duly licensed contractor. The fact that use plaintiff was such a contractor is set forth in Reporter's Transcript, page 52, line 13 to page 53, line 10. Also, the contract being performed on federal land, no state license was required. *Oklahoma City* -vs- *Sanders*, 94 Fed. 2d 323.

The next issue is whether or not use plaintiff furnished labor or materials within one year preceding the filing of the action. The record is replete that work commenced on or about June 22, 1962 and continued to about October 30, 1962, (Reporter's Transcript, page 54, line 18 to page 55, line 17). The defendant's foreman, Mr. White, testified that on or about September 20th when they went off the job, the job was completed 95.5% (Reporter's Transcript, page 230, line 5 to line 11). The issue raised by the appellant whether the work was done and performed under the contract has been accepted, was answered by testimony of defendant Stilwell (Reporter's Transcript, page 243, line 24 and 25). The further contention whether or not the defendant Stilwell has been paid by the government was again answered by testimony of defendant Stilwell that on or about December 3, 1962, he received the balance of the contract with the exception of negotiation with the government on some portion of the project not covered by the subcontract (Reporter's Transcript, page 243, line 3 to 8). The other issues of fact which the appellant assumedly raises we submit have been answered by the statement of the case which is foregoing. Testimony was adduced by the plaintiff Collins himself and by the defendant's foreman, Mr. White, to the effect that the use plaintiff was ordered off the job on or about October 30, 1962, at which time the percentage of completion was approximately 95.5% (Reporter's Transcript, page 231, lines 9-11).

The issues of law set forth by the appellant on page 6 of his brief would seem to be more in the nature of a dispute as to facts rather than law. The action was brought by the use plaintiff more than 90 days after the date that the use plaintiff last furn-

ished labor or materials and within one year from such date.

ARGUMENT OF THE LAW

Appellee agrees with appellant that the law of the place where the contract was entered into governs.

12 *Cal. Jur. 2d*, page 443, Section 221. "The commonlaw rule which required full performance in strict accordance with a contract before recovery could be had has been relaxed. It is settled, especially in the case of building contracts where one party is enjoying the fruits of a contractor's work, that if there has been a substantial performance in good faith, if the failure to make full performance can be compensated in damages, and if the omissions and deviations were not wilful or fraudulent and do not substantially affect the usefulness of the work for the purposes for which it was intended, the performing party may, in an action on the contract, recover the amount unpaid on the contract price, less the amount allowed as damages for the failure in strict performance. Substantial justice is provided by this course of procedure and no property right is violated. While this principle, which is sometimes spoken of as the modern equitable doctrine of substantial performance, is applied most frequently in building and construction contracts, a substantial compliance meets the requirements of any obligation."

The record is replete by testimony of the defendant's own foreman as to the substantial completion of the job by the use plaintiff.

See also *Thomas Haverty* -vs- *Jones*, 185 California 285, 197 Pac. 105.

Complaint was made by the defendant that the

performance by the use plaintiff was not to his satisfaction. As shown by the records, no damages accrued to the defendant for any alleged delay. (Reporter's Transcript, page 243, line 9 to 17).

"However, the general rule is that failure to complete the work within the specified time does not ipso facto terminate the contract but only gives the owner the right to rescind the contract if he so elects, or in the alternative to claim compensation for the damage caused by the delay. Thus, where a contractor has failed to complete the work in the specified time but is urged by the owner to hurry the completion as much as possible, the conduct of the owner does not amount to a waiver of his right to damages for delay but only a waiver of his right to rescind. (9 *Cal. Jur. 2d*, page 294).

In this case no damages were shown whatsoever for any alleged delay on the part of the use plaintiff On the other hand, evidence is shown by the record that any delay in performance by the use plaintiff was occasioned by the lack of performance by the prime contractor. (Reporter's Transcript, page 68, line 19 to page 70, line 8).

Appellee further agrees with the appellant that the party holding the affirmative of an issue must produce the evidence to prove it as set forth in Section 1981 of the *Code of Civil Procedure* of the State of California. This provision is particularly pertinent to the allegation by the appellant of the allowability of his so-called back charges. The burden of proof is upon the party claiming the back charges as is set forth in *U. S. ex rel, Johnson* -vs- *Morely Construction Company*, 96 Fed. 2d 781. Requiring the use plaintiff to do earth fill work and cement laying although it was not included in the subcontract was

not sustained by any proof at all whatsoever by the defendant Stilwell. Indeed, it appears affirmatively from the plans and specifications being Exhibits 9 and 10, that no such requirement was to have been fulfilled by the use plaintiff. The other items appearing in Exhibit P relating to installation of metal doors and frames appeared in the specifications (Plaintiff's Exhibit 9) under section 24 and did not appear in the subcontract. Also, in Exhibit P defendant sought reimbursement for painting. Again referring to the specifications, such work is set forth in Section 27 and plaintiff was not required by his contract to do such work. Use plaintiff has agreed to the deduction of the clean-up charges which were made by Utility Heating and Air Conditioning. These other back charges were never raised at the pre-trial conference nor in the pre-trial order nor in the pleadings of the action and in fact were not brought to the attention of use plaintiff until the trial of this action.

ATTORNEY'S FEES

Under the provisions of the subcontract prepared by defendant, Stilwell, (Plaintiff's Exhibit 8) the parties stipulated that if suit is brought to enforce any provisions of this agreement or collect damages for breach thereof, the losing party shall pay to the successful party all costs and attorney's fees of the successful party's attorneys as fixed by the proper court.

In that connection, the trial court awarded the use plaintiff attorney's fees in the sum of $1,500.00. It is respectfully represented by the undersigned that the use plaintiff should be allowed in this appeal an additional sum of $1,000.00 for the reasonable value

of the services of use plaintiff's attorney's fees in this appeal.

CROSS-COMPLAINT

Lew F. Stilwell, Inc. filed a cross-complaint asking for $100,000.00 due apparently to the fact that the use plaintiff made demand for payment and filed suit to collect the money that was due him. See Reporter's Transcript, page 206, line 5 through page 207, line 12. However, the court permitted the defendant to testify as to his problems with respect to obtaining bonds. This testimony indicated that defendant could obtain bonds but that he had to get some financially responsible person to co-sign for him. He was asked by his counsel what expense he went to to effect such indemnity arrangements and he said $100,000.00. (Reporter's Transcript, page 209, lines 7 through 15). It is felt by the use plaintiff that there is absolutely no foundation in the evidence presented to the court, even looking at it most favorably, to the appellant to support a cross-complaint of any variety. As the trial court indicated that if it were the rule that the defendant in a Miller Act case could bring a cross-complaint for damage to his bond ability, then anybody who had a Miller Act case would be afraid to file such an action because he would be faced with a claim for damage.

CONCLUSION

Appellee respectfully represents that the decision of the trial court is overwhelmingly supported by the evidence; that since the matter is purely a question of fact, in the absence of an abuse of discretion the

judgment should be affirmed and that the appellee should recover costs herein together with attorney's fees for the work involved in this appeal.

Respectfully submitted,

FRED H. ALMY
Attorney for Appellee

CERTIFICATE

I certify that in connection with the preparation of this Brief, I have examined rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing Brief is in full compliance with these rules.

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Fred H. Almy